Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

DAVID J. NEWBURGER
SUSAN SPIEGEL
NEWBURGER & VOSSMEYER
393 N. Euclid, Suite 300
St. Louis, Missouri 63108
314/361-2555
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., *et al.*,
Petitioners,

v.

GENE MCNARY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

Petitioners reply to Respondents in order to ensure that the respective Respondents' efforts to obfuscate Petitioners' position fails. Instead of addressing whether the question presented justifies review by this Court, both sets of Respondents pressed upon the Court their separate versions of the merits in the hope of confusing both the nature of the original action and the issues at hand.

Petitioners ask this Court to determine whether the Tax Injunction Act, 28 U.S.C. §1341, bars an action at law for

damages arising out of malicious conduct by certain individuals in the course of performing their duties as state and local tax officials. Both sets of Respondents inaccurately contend that Petitioners claim a special privilege to avoid the bar of §1341 because theirs is a Civil Rights action. Petitioners do not make that claim. Petitioners contend only that the prohibitions of the Tax Injunction Act do not bar federal courts from hearing actions at law for damages.

Whether the Tax Injunction Act extends to purely legal proceedings as well as to equitable actions has never been explicitly determined by this Court. Two Circuits of the Court of Appeals have rendered conflicting decisions on the question. The Seventh Circuit ruled that §1341 does not bar suits for damages, *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978); the Eighth Circuit in affirming without opinion the ruling of the District Court in the instant action ruled the opposite. By implication, other courts have taken each side of the issue. (See Petition at 7).

Both Respondent groups deny the existence of such conflict by setting forth incorrect depictions of the relevant facts and law. The State Employee Respondents attempt to conceal that conflict by characterizing Petitioners' suit as one for a tax refund. The County Employee Respondents repudiated that characterization. And, the District Court explicitly recognized that its holding, subsequently adopted by the Eighth Circuit, conflicted with that of the Seventh Circuit on the central issue before it concerning "whether the [Tax Injunction] Act prohibits a suit for damages in the circumstances presently alleged." (Appendix B, A-6).

The County Employee Respondents attempt to conceal the conflict between the Circuits by distorting the allegations in Petitioners' complaint. The facts of the instant case are indistinguishable from those in *Fulton Market.* In fact, Petitioners' lawsuit was modeled upon that action. Like the instant

case, *Fulton Market* involved allegations of a systematic, knowing, intentional, fraudulent, and invidious failure to equalize property tax assessments. 582 F.2d at 1073. That close parallel between the two cases underscores the conflict in the legal results. Respondents cite no legal support, other than the District Court opinion at issue, for the proposition that federal courts should apply §1341 differentially according to the type of discrimination alleged. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), speaks the contrary.

The County Employee Respondents' focus upon the basis of the alleged discrimination misses the point of this lawsuit. These Respondents suggest that discrimination based upon the characteristics of property involves the essence of the state taxation system. Yet, Petitioners do not challenge or seek to disrupt the bureaucratic operation of the taxing system; Petitioners' complaint concerns only the calculated, malicious misconduct of some individuals who, operating under the color of the state law, have wrongfully damaged Petitioners. Contrary to Respondents' representations, the Seventh Circuit in like circumstances rejected the notion that an action for damages disrupts the taxation system. *Fulton Market*, 582 F.2d at 1078.

Similarly, the County Employee Respondents' contention that the two appellate cases are not parallel as to the matter of available state remedies wholly misstates the holding of the Seventh Circuit. That court did not even consider the quality of state remedies in determining that §1341 does not bar legal proceedings for damages.

In sum, Petitioners seeks this Court's determination of a question that has been resolved inconsistently by the federal appellate courts and that bears significance undenied by Respondents.

Respectfully submitted,

DAVID J. NEWBURGER
SUSAN SPIEGEL
NEWBURGER & VOSSMEYER
393 N. Euclid, Suite 300
St. Louis, Missouri 63108
314/361-2555
Attorneys for Petitioners